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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY RUIZ AGUIRRE, Defendant and Appellant.	G045009 (Super. Ct. No. 10WF1220) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on April 5, 2012, be modified as follows:

1. On page 3, second line, delete the sentence beginning with "Because we reverse for a new trial on this . . . ." and insert the following sentence in its place: We reverse for a new trial based on the lack of an entrapment instruction.

2. Add the following paragraph before the "FACTS" heading on page 3 and after the new sentence that begins with "We reverse for a new trial . . . ."

We need not reach the remainder of defendant's contentions, with one exception. We reject defendant's contention that there was insufficient evidence to convict him under section 288.3, subdivision (a). Defendant contends that an actual minor victim must exist for the elements of this crime to be satisfied, and that the facts disclose that defendant was communicating with a police officer, not an actual victim. We disagree with defendant's interpretation of section 288.3.

3. Add the following section before the "DISPOSITION" heading on page 15:

Interpretation of Section 288.3

Defendant also asserts there was insufficient evidence to convict him of violating section 288.3, subdivision (a): "Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit [certain specified sex offenses] involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense." (See generally *People v. Keister* (2011) 198 Cal.App.4th 442 [rejecting various challenges to constitutionality of § 288.3].)

Defendant's argument is premised on his novel interpretation of section 288.3. He claims the statute should be interpreted to require an actual minor victim (rather than an adult posing as a minor). Defendant contrasts the language of section 288.3, subdivision (a), with language in another statute that makes clear the "minor" need not be an actual minor. (See § 288.4, subd. (a)(1) ["Every person who, motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor *or a person he or she believes to be a minor*" (italics added)].) Clearly, if defendant's

interpretation of section 288.3 is correct, he cannot be convicted of a violation of section 288.3 because no minor victim was actually involved in the facts of this case.

But we disagree with defendant's interpretation. Section 288.3 explicitly indicates that a defendant is guilty if he or she "attempts to contact or communicate with a minor" with the requisite mental state. The lack of an actual minor is not a defense to an attempt to commit a sex offense against a minor. (See *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185-186 [defendant may be found guilty of attempt to commit violations of §§ 288, subd. (a), and 288.2, subd. (a), even though intended victims were not in fact under 14 years of age]; *People v. Reed* (1996) 53 Cal.App.4th 389, 396-397 [defendant guilty of attempted lewd conduct with regard to imaginary child victims created by police officer; "'factual impossibility is not a defense to a charge of attempt'"].)

Defendant claims section 288.3, subdivision (a), is different from other sex offense statutes because it states the defendant must be an individual "who knows or reasonably should know that the person is a minor . . . ." But this language simply makes clear that the offense does not impose strict liability upon someone who does not know and has no reason to know that the person they are communicating with is a minor. Thus, under the correct interpretation of the statute, there is substantial evidence supporting defendant's conviction under section 288.3, subdivision (a), and retrial on that count before a properly instructed jury is not barred by double jeopardy principles.

The petition for rehearing is DENIED.

The modification does not change the judgment.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.